

**STATE BOARD OF EQUALIZATION**

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December 7, 1993

Mr. C--- L. N---
Attorney and Counselor at Law
XXXX --- --- ---, --- Floor
--- ---, CA XXXXX

Dear Mr. N---:

This is in response to your letter of October 25, 1993 where you ask how successor liability applies to the sale of a significant portion of a business and anticipated sale of the remainder. Although the facts are related, we will restate them as they apply to each question.

You state your client incurred a substantial audit liability with the Board in the late 1980's. In January, 1990, your client sold approximately 90% of its assets and business activities which were all conducted from a single location to a new unrelated corporation. Your client continued in business. In January, 1990, the Board auditor was provided with a copy of the sales agreement which became part of the audit work papers. The audit was completed more than three years ago. You ask:

“Did providing your auditor with a copy of the sales agreement for the portion of the business which was sold constitute adequate notice to start the running of the three year statute of limitations on successor determinations set forth in section 6814 of the Revenue and Taxation Code and is successor liability against the buyer of the majority of my client's business now barred by the statute of limitations?”

Successor Liability - In General

Revenue and Taxation Code section 6811 states:

“If any person liable for any amount under this part sells out his business or stock of goods or quits the business, his successors or assigns shall withhold sufficient of the purchase price to cover such amount until the former owner produces a receipt from the board showing that it has been paid or a certificate stating that no amount is due.”

If the purchaser fails to withhold from the purchase price as required, the purchaser becomes personally liable for the payment of the amount required to be withheld to the extent of the purchase price. (Rev. & Tax. Code § 6812).

Based on your question referencing the statute of limitations on successor liability we assume that the withholding requirement, as stated above, was not satisfied. We further assume your client (the former owner), did not produce to the purchaser either a receipt from the Board showing the liability had been paid or a certificate stating no amount was due.

A successor will be relieved of successor liability if Regulation 1702(c) is satisfied. As relevant here that provision states:

“The purchaser of the business or stock of goods will be released from further obligation to withhold the purchase price if he obtains a certificate from the board stating that no taxes, interest, or penalties are due from a predecessor. He will also be released if he makes a written request to the board for a certificate and if the board does not issue the certificate or mail to the purchaser a notice of the amount of the tax, interest, and penalties that must be paid as a condition of issuing the certificate within 60 days after the latest of the following dates:

“(1) The date the board receives a written request from the purchaser for a certificate.

“(2) The date of the sale of the business or stock of goods.

“(3) The date the former owner's records are made available for audit.

“The certificate may be issued after the payment of all amounts due under the Sales and Use Tax Law, according to the records of the board as of the date of the certificate, or after the payment of the amounts, including amounts not yet ascertained, is secured to the satisfaction of the board. Such security is not subject to the limitations contained in Section 6701.”

Based on your letter we assume the purchaser did not make a written request to the Board for a certificate as set out above. Based on this assumption and those set forth above, it is our opinion your client's successor was liable for any obligation of the business which existed when it was purchased.

You have asked if “providing your auditor with a copy of the sales agreement for the portion of the business which was sold constitute[s] adequate notice” to trigger the running of the statute of limitations. The applicable statute of limitation provisions are found in Regulation 1702(d)(1):

“The liability is enforced by service of a notice of successor liability not later than three years after the date the board receives written notice of the purchase of the business or stock of goods. The successor may petition the Board for reconsideration of the liability within 30 days after service. The liability becomes final, and the amount due and payable, in the same manner as determinations and redetermination of other sales and use tax liability.”

The statute of limitations is triggered upon adequate notice to the Board. Although it is possible that providing the sales agreement constituted adequate notice, we do not have sufficient information to determine if that notice was sufficient to trigger the running of the statute of limitations.

You also ask about your client's continuation in business, concentrating on expanding its sales activity related to the product lines which your client retained. Your client relocated its sales office outside of California and currently maintains a repair facility in California which may eventually be moved because there are only three clients left in California. Your client's sole stockholders plan to retire in the next five years and eventually hope to sell the remaining business. You want us to assume the sale is an asset sale rather than a sale of stock in the corporation, and that the business is sold today while there is still a stock of goods in California and your client is still conducting business in California. You ask:

“I would like to know what successor liability any potential buyer may incur so that this can be properly disclosed to any potential buyer.

“Is the buyer of the business responsible for withholding tax related to the portion of the audit liability related to only the 10% portion of the business which is purchased, or is the buyer responsible for also withholding a sufficient amount to cover the portion of the audit liability related to the 90% of the business sold in January 1990?”

Regulation 1702(b) discusses the extent of the liability that a potential buyer of your client's business could incur:

“The liability of the successor or purchaser of a business or stock of goods extends to amounts incurred with reference to the operation of the business by the predecessor or any former owner, including the sale thereof, even though not then determined against him or her, which include taxes, interest thereon to the date of payment of the taxes, and penalties including penalties for nonpayment of taxes. Liability also extends to penalties determined and unpaid at the time of sale for negligence or intentional disregard of the Sales and Use Tax Law or authorized rules and regulations, and fraud or intent to evade the Sales and Use Tax Law or authorized rules and regulations.”

Any liability your client has incurred in its operation of the business will follow your client, and a purchaser of the remaining business must withhold a sufficient amount of that purchase price to cover any liability of that business, including any debt from the prior (90%) sale of the business. (Rev. & Tax. Code § 6811.) If the purchaser fails to withhold as required, the purchaser becomes personally liable for the amounts required to be withheld, to the extent of the purchase price. (Rev. & Tax. Code § 6812.)

You state eventually your client may cease doing business in California and move the repair facility and stock of goods outside of California. If, following cessation of the business in California, your client were to sell its business or stock of goods (which would then be an out-of-state stock of goods) to a nonresident of California who does not intend to do business in California, you ask:

“Does the Board believe they have authority to impose successor liability on a nonresident of the state when the sale of the business or stock of goods occurred outside of California?”

Based on your scenario, the business would be located outside of California at the time of sale and sold to an out-of-state resident. The purchaser would not have purchased the business in California and would have no intention of doing business in California. Under these facts, we believe that the purchaser would be outside our jurisdiction, and that we would not have the authority to impose successor liability.

If we can answer any other questions please feel free to write again.

Sincerely,

Rachel M. Aragon
Staff Counsel

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